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No. 90-757

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In The

# Supreme Court of the United States

October Term, 1990

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARC MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

*Petitioners,*

versus

BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

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## QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

A. The First Supreme Court District in Louisiana.. 1

B. Prior Proceedings in this Litigation ..... 3

ARGUMENT ..... 5

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT SECTION 2(B) OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE JUDICIARY ..... 5

A. The *LULAC* Decision ..... 5

B. The Genesis of § 2(b) of the Voting Rights Act ..... 7

C. This Court has always held that Judges are not "representatives" ..... 8

D. Other Federal Courts have held that Judges are not "representatives" ..... 10

E. The Term "representatives" is not a Synonym for "elected officials" ..... 14

F. The Fundamental Difference Between "representatives" and Members of the Judiciary is Deeply Rooted in this Country's History... 17



TABLE OF CONTENTS – Continued

Page

II. IF THE ONE-MAN, ONE-VOTE REQUIREMENT DOES NOT APPLY TO THE JUDICIARY, THE CONCEPT OF MINORITY VOTE DILUTION SET FORTH IN § 2(B) DOES NOT APPLY TO THE JUDICIARY ..... 22

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

Page

CASES:

*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ..... 10, 29

*Brown v. Board of School Commissioners of Mobile County*, 706 F.2d 1103 (11th Cir.), *affirmed*, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 705 (1983) ..... 8

*Buchanan v. Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972) ..... 14

*Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), *vacated* 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 89 S.Ct. 118, 21 L.Ed.2d 110 (1968) ..... 13

*Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970) ..... 29

*Chisom v. Edwards*, 659 F. Supp. 183 (E.D.La. 1987) ..... 4

*Chisom v. Edwards*, 690 F. Supp. 1524 (E.D.La. 1988) ..... 4

*Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) ..... 4

*Chisom v. Edwards*, 850 F.2d 1051 (5th Cir. 1988) ..... 4

*Chisom v. Edwards*, 853 F.2d 1186 (5th Cir. 1988) ..... 4

*Chisom v. Roemer*, ___ F. Supp. ___ (E.D. La. 1989) ..... 1, 2, 3, 4, 5

*Chisom v. Roemer*, ___ F. Supp. ___ (E.D. La. 1990) ..... 5

*Chisom v. Roemer*, 917 F.2d 187 (5th Cir. 1990) ..... 5, 7

*City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 64 L.Ed.2d 47 (1980) ..... 7, 23, 24, 25, 26



## TABLE OF AUTHORITIES – Continued

Page

*Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) ..... 14

*Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) ..... 10

*Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) ..... 15

*Edge v. Sumter County School District*, 775 F.2d 1509 (11th Cir. 1985) ..... 8

*Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984) ..... 15

*Fahey v. Darigan*, 405 F. Supp. 1386 (D.C.R.I. 1975) ..... 14

*Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214 (6th Cir. 1972) ..... 13

*Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989) ..... 8

*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) ..... 10

*Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *affirmed*, 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972) ..... 10, 11

*Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *affirmed*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984) ..... 9

*Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967) ..... 13

*Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) ..... 8

TABLE OF AUTHORITIES – Continued

Page

*Latin American Citizens Council #4434 v. Clements*, 902 F.2d 293 (5th Cir. 1990)..... 6

*Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc)..... *passim*

*New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967)..... 12

*Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)..... 10, 12, 23, 29

*Roemer v. Chisom*, 488 U.S. 955, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988)..... 4

*Romiti v. Kerner*, 256 F. Supp. 35 (N.D. Ill. 1966)..... 14

*Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982)..... 14

*Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) .11, 29

*Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).....7, 23, 24, 27, 28

*United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984)..... 8

*Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984)..... 8

*Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972)..... 9, 23, 26, 27

*Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973).....9, 22, 23, 26, 27

*Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971)..... 28



TABLE OF AUTHORITIES – Continued

Page

*White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)..... 7

*Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) .... 27

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution Fourteenth Amendment.....1, 25

United States Constitution Fifteenth Amendment ..1, 25

28 U.S.C. § 1331..... 1

28 U.S.C. § 1343..... 1

28 U.S.C. § 2201..... 1

28 U.S.C. § 2202..... 1

42 U.S.C. § 1973 [*Voting Rights Act*]..... *passim*

42 U.S.C. § 1983..... 1

1879 Louisiana Constitution Article 82 ..... 2

1898 Louisiana Constitution Article 87 ..... 2

1913 Louisiana Constitution Article 87 ..... 2

1921 Louisiana Constitution Article 7 § 9 ..... 2

1974 Louisiana Constitution Article 5 § 4 .....2, 3

TABLE OF AUTHORITIES – Continued

Page

RULES:

Fed.R.Civ.P.12(b)(6) ..... 3

LEGISLATIVE HISTORY:

S.Rep. No. 417, 97th Cong. 2d Sess. *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196..... 23

BOOKS:

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NEWSPAPERS:

*Baton Rouge State-Times*, October 9th, 1989..... 3

*New Orleans Times-Picayune*, October 8th, 1989..... 3

## STATEMENT OF THE CASE

Petitioners brought this suit in the United States District Court for the Eastern District of Louisiana on behalf of all black registered voters in Orleans Parish, approximately 135,000 people. The suit challenged the at-large election of two Justices to the Louisiana Supreme Court from the parishes of Orleans, St. Bernard, Plaquemines and Jefferson (the First Supreme Court District) as being in violation of the 1965 Voting Rights Act, as amended, because of alleged dilution of the voting strength of the Petitioners. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 1973. The action sought declaratory and injunctive relief, 42 U.S.C. §§ 1973 and 1983. Petitioners also sought relief under 28 U.S.C. §§ 2201 and 2202 and the Fourteenth and Fifteenth Amendments to the United States Constitution. Petitioners sought the division of the First Supreme Court District into two districts, one to be comprised of the parishes of Jefferson, Plaquemines and St. Bernard and the other of Orleans Parish where blacks constituted a majority of the registered voters.

### A. The First Supreme Court District in Louisiana.

The Louisiana Supreme Court is the highest court in the State of Louisiana. The Court is composed of seven Justices, elected from six Supreme Court districts for a term of ten years. *Chisom v. Roemer*, ___ F. Supp. ___, Slip Opinion 3 (E.D. La. 1989) (hereinafter cited as *"Slip Op. #"*). No parish lines are cut by any of the election districts for the Supreme Court. *Slip Op.* 4.

The First Supreme Court District, consisting of the city of New Orleans and its surrounding environs,[1] has been the only district that has elected two Justices since adoption of the 1879 Louisiana Constitution more than 110 years ago. *Slip Op.* 16; *see* Louisiana 1879 Constitution Article 82; Louisiana 1898 Constitution Article 87; Louisiana 1913 Constitution Article 87; Louisiana 1921 Constitution Article 7, § 9; and Louisiana 1974 Constitution Article 5, § 4.

The most recent Louisiana Constitution took effect in 1974 after the 1973 Louisiana Constitutional Convention. Twelve of the 132 delegates to the Convention were black. *Slip Op.* 17. During the Convention three amendments were proposed to divide the Supreme Court into single-member districts. The first failed 27-85, with one black delegate voting for the proposal, eleven [sic – should be ten] against, and one absent. *Slip Op.* 18. The second failed 47-67, with seven blacks voting for the amendment, four against, and one absent. *Slip Op.* 18. The final amendment proposed splitting the First Supreme Court District into two districts, with one Justice to be elected from each. When a white delegate argued in favor of the proposal, a black delegate from Orleans Parish responded that the present arrangement should not be changed. *Slip Op.* 19. This amendment was defeated 50-63, with five blacks voting for the amendment and seven against. *Slip Op.* 19. The final districting plan, leaving the First Supreme Court District with two Justices, was adopted 103-9, with eight blacks voting for the plan, one against,

[1] The parishes in the First Supreme Court District include Orleans, St. Bernard, Plaquemines, and Jefferson Parishes.



and two absent. *Slip Op.* 19. Four of the blacks voting for the plan were delegates from Orleans Parish.

The proposed Constitution was approved by the United States Department of Justice and ratified by the voters of Louisiana on April 20th, 1974. *Slip Op.* 19. Although the Louisiana Legislature has the authority to change districts and the number of Justices by a two-thirds vote, 1974 Louisiana Constitution Article 5, § 4, it has never done so. *Slip Op.* 19. A proposed constitutional amendment to split the district so that Orleans Parish would constitute a district by itself was defeated by the Louisiana voters in October, 1989 with the unofficial Associated Press totals showing a vote of 151,342 for the amendment and 451,845 against the amendment. *Baton Rouge State-Times*, October 9th, 1989. In Orleans Parish the amendment was defeated by a three-to-one majority, with 16,526 voting for the amendment and 46,354 voting against the amendment. *New Orleans Times-Picayune*, October 8th, 1989.[2]

### B. Prior Proceedings in this Litigation.

After the complaint was filed, respondents filed a Fed.R.Civ.P.12(b)(6) motion to dismiss for the failure of the petitioners to state a claim upon which relief could be

[2] Given that Orleans Parish is majority black in both population (55.2%) and registered voters (53.6%), and given that the amendment was defeated three to one in Orleans Parish, it is fair to surmise that blacks in Orleans Parish opposed the amendment which would bring about the very same remedy sought by petitioners herein.

granted. The district court agreed with respondents' contention that it was not the intention of Congress to apply the word "representatives" in Section 2 of the Voting Rights Act, as amended, to embrace members of the judiciary. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987). The district court drew a distinction between the impartial functions performed by the judiciary without a constituency and the functions performed by representatives who are not expected to be impartial but rather reflective of the needs and wishes of their constituency. 659 F. Supp. at 186.

The petitioners appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the district court and remanded the case because the Court concluded that Section 2 does apply to the election of state court judges. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *rehearing and rehearing en banc denied, cert. denied sub nom. Roemer v. Chisom*, 488 U.S. 955, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988).

The petitioners then successfully moved to enjoin the election of a Justice from the First Supreme Court District during the regularly scheduled Fall, 1988 election. *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. 1988). The Fifth Circuit stayed the injunction, 850 F.2d 1051 (5th Cir. 1988), and ultimately reversed the injunction, 853 F.2d 1186 (5th Cir. 1988).

After a trial on the merits, the district court dismissed petitioners' statutory and constitutional claims. *Chisom v. Roemer*, ___ F. Supp. ___ (E.D. La. 1989). The court concluded:



> that the petitioners had not proven that the use of a multi-member electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. As detailed in the court's findings of fact, the statistical evidence regarding judicial and non-judicial elections shows that the blacks have had full access to the political process and routinely elect their preferred candidates, often times joining forces with a significant portion of the white electorate, and thereby creating significant crossover voting.

*Slip Op.* at 40-41. The petitioners appealed the Voting Rights Act decision.[3] The Fifth Circuit remanded for dismissal for failure to state a claim upon which relief may be granted. 917 F.2d 187 (5th Cir. 1990). On remand the case was dismissed. ___ F. Supp. ___ (E.D. La. 1990). Thereafter, this Petition was filed.

## ARGUMENT

### I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT SECTION 2(b) OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE JUDICIARY.

#### A. The LULAC Decision.

The United States Court of Appeals for the Fifth Circuit dismissed the appeal in this case based on the *en banc* decision of that Court in *Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en

[3] Petitioners did not appeal the district court's rejection of their constitutional claim of intentional discrimination.

banc) (hereinafter *"LULAC"*).[4] The plaintiffs in *LULAC* challenged the county-wide, at-large election of trial judges in Texas as violative of § 2(b) of the Voting Rights Act and of the United States Constitution. The trial court denied the constitutional claims, finding that the requisite discriminatory intent had not been proven. 914 F.2d at 623. The trial court, however, did find "that the Texas law produced an *unintended* dilution of minority voting strength" in violation of the "results" test of § 2(b) of the Voting Rights Act. 914 F.2d at 623 (emphasis in original). On appeal, a panel of the Fifth Circuit held that § 2(b) did not apply to trial judges because they are single-member officeholders who can be elected only at-large. 902 F.2d 293 (5th Cir. 1990).

The Fifth Circuit granted an *en banc* hearing *sua sponte*. A majority held that judges are not "representatives" within the meaning of § 2(b) of the Voting Rights Act and that the "results" test of § 2(b) does not apply to the judiciary. 914 F.2d 620 (5th Cir. 1990). Five judges concurred, agreeing with the view of the panel that trial judges are single-member officeholders. 914 F.2d at 634. Chief Judge Clark also concurred, limiting the case to its facts. 914 F.2d at 631. Only one Judge, Judge Sam Johnson, dissented. 914 F.2d at 651. After the *en banc* opinion was published, the panel in *Chisom* remanded this case to

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[4] On November 21, 1990, a group of plaintiffs-intervenors in that case, the Houston Lawyers' Association and six individuals, filed a petition for a writ of certiorari asking this Court to review the judgment and opinion of the Fifth Circuit in *LULAC*. That petition is pending.



the district judge with orders to dismiss all Voting Rights Act claims. 917 F.2d 187 (5th Cir. 1990).

### B. The Genesis of § 2(b) of the Voting Rights Act.

Section 2 of the Voting Rights Act of 1965 forbade imposition or application of any "voting qualification or prerequisite to voting, or standard, practice, or procedure" to prevent any citizen from voting on account of race or color. 42 U.S.C. § 1973. This Court in *City of Mobile v Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), held that enforcement of § 2 required proof of racially-discriminatory intent.

Congress then passed the Voting Rights Act of 1982 amending § 2 to

> restore the "results test" – the legal standard that governed voting discrimination cases prior to [the Supreme Court's] decision in *Mobile v. Bolden* * * * * Under the "results test," plaintiffs are not required to demonstrate the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

*Thornburg v. Gingles*, 478 U.S. 30, 43 n. 8, 106 S.Ct. 2752, 92 L.Ed.2d 25, 42 n. 8 (1986) (citations omitted). In writing § 2(b), Congress chose – with one significant exception – the words of Justice White in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Justice White stated that plaintiffs' burden of proof was to show:

> that its members had less opportunity than did other residents in the district to participate in the political processes and to elect *legislators* of their choice.

412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324 (emphasis supplied). Section 2(b) provides that a plaintiff class of citizens must show:

> that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.

42 U.S.C. § 1973(b) (emphasis supplied). As the majority in *LULAC* recognized, the choice of the word "representatives" was a deliberate one: "the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning." 914 F.2d at 625.

### C. This Court has always held that Judges are not "representatives."

As stated in the prior section, § 2(b) applies to "representatives." Members of the legislative and executive branches are certainly representatives, and the case law is replete with decisions holding that § 2(b) applies to such entities. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989) (city council and mayor); *Edge v. Sumter County School District*, 775 F.2d 1509 (11th Cir. 1985) (school board); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) (city aldermen); *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984) (county commission); *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) (city council); *Brown v. Board of School Commissioners of Mobile County*, 706 F.2d 1103 (11th Cir.), *affirmed*, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 705 (1983) (board of school commissioners); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *affirmed*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984) (congressmen).



Judges, however, traditionally have not been considered "representatives." This Court so held by affirming a three judge court voting rights decision that the "one-man, one-vote" concept does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In refusing to apply "one-man, one vote" precepts, the three judge court reasoned as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)]:
>
> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 153.

*Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (three judge court). The *LULAC* majority opinion reasons that "[i]t is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning." 914 F.2d at 627.

Similarly, Justice Frankfurter has stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 575, 71 S.Ct. 857, 95 L.Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in the judgment). And Justice Stewart has contrasted the Court's duty with that of the people's representatives:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

*Griswold v. Connecticut*, 381 U.S. 479, 530-31, 85 S.Ct. 1678, 14 L.Ed.2d 510, 542 (1965) (Stewart, J., dissenting) (emphasis supplied).

### D. Other Federal Courts have held that Judges are not "representatives."

The lower federal courts have also held that judges are not representatives. The plaintiffs in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three judge court), attacked the North Carolina system of nominating judges by districts and electing them statewide, contending that it denied voters equal protection of the laws. They cited, *inter alia*, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The court distinguished these and the other cases because they "dealt with the election of the representatives of the people –



officials who make laws, levy and collect taxes, and generally manage and govern people." 335 F. Supp. at 930. After discussing two precedents involving reapportionment, the court stated:

> While *Buchanan [v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)] and [*New York State Association of Trial Lawyers v.] Rockefeller* [267 F. Supp. 148 (S.D.N.Y. 1967], deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

335 F. Supp. at 932. The *Holshouser* case was affirmed by the Supreme Court. 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972).

A similar system of electing judges in Georgia was upheld in *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) (three judge court). The court stated:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no

> way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

234 F. Supp. at 577.

In two New York cases the plaintiffs sought judicial reapportionment on the basis of population, again relying on legislative reapportionment cases such as *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967), the court rejected the comparison, stating that:

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> * * * *
>
> In contrast to legislative apportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

267 F. Supp. at 153-54. A three judge court rejected a similar suit in the Eastern District of New York, quoting the *Rockefeller* opinion's statement that the state judiciary



is not "responsible for achieving representative government." *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three judge court).

The Ohio judicial structure guaranteeing each county at least one judge in the court of general jurisdiction came under attack in *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 89 S.Ct. 118, 21 L.Ed.2d 110 (1968). Once again, the complaint was predicated upon the Supreme Court's reapportionment cases. The court noted that when representatives to a legislative body are malapportioned, the voting strength of individual citizens becomes unequal, causing a dilution of power. 249 F. Supp. at 865. Judges, however, are not governed by such a rule:

> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people.

249 F. Supp. at 865.[5]

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[5] Numerous other decisions make a similar distinction between judges and representative officials. *See Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of one-man, one-vote to judicial selection in Ohio and holding "that equal protection does not require the

(Continued on following page)

**E. The Term "representatives" is not a Synonym for "elected officials".**

Earlier sections of this Response demonstrate that this Court and the lower federal courts do not consider judges to be "representatives." This section argues that the word "representative" as used in § 2(b) is not synonymous with "elected official" and should instead be given its commonly understood meaning. This Court has laid down definitive guidelines for construing language which appears in Congressional acts.

In *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980), the Court stated:

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allocation of state judges on this basis"); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n. 6 (D.R.I. 1975) (holding one-man, one-vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (three judge court) (rejecting application of one-man, one-vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary").



> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

447 U.S. at 108, 100 S.Ct. 2051, 64 L.Ed.2d at 773.

Four years later, in furtherance of this concept of construction, the Court held in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984):

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that " '[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.' "

466 U.S. at 772, 104 S.Ct. 2105, 80 L.Ed.2d at 761 (citations omitted).

And in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court said:

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language * * * * If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is " 'a clearly expressed legislative intent to the contrary.' "

460 U.S. at 110, 103 S.Ct. 986, 74 L.Ed.2d at 853 (citations omitted).

The term "representatives" refers to those who serve a specialized constituency and whose role is to represent the needs and interests of that constituency. The term "representatives" has never been commonly accepted as including the judicial branch; indeed, the reverse is true –

namely, the judicial branch always has been treated as separate and distinct from the two representative arms of government.

A representative of a district, be it federal, state, or local, exists to serve and favor his or her constituency, while hopefully also working for the good of the governmental jurisdiction as a whole. United States representatives are expected to help obtain government contracts for their districts; no one, however, would expect a federal judge to uphold such a contract citing as a reason the need of his area for governmental business. State legislators are expected to seek bridges and roads for their districts; no one, however, would expect a state judge to mandate that such bridges and roads be built merely because the people want them. City councilmen are expected to promote drainage projects for their council district; no one, however, would expect a city judge to require them to keep his voters happy.

Judges thus are not representatives; further, they should not be representatives. The larger the constituency, the less parochial pressures can be brought to bear. An advantage to at-large elections for judges is that judges can make the difficult decisions without undue fear of dissatisfaction in the electorate. A judge would be much less likely to vote against the residents of a neighborhood on a zoning issue if that judge was elected solely by that neighborhood. Justice ought to be identical throughout a judicial system; electing judges from neighborhoods, however, might make for a system of individualized justice currently foreign to the United States. Admittedly, many problems could be cured on appeal; however, it can be extremely difficult to reverse a detailed record of fact-finding even when the facts have been slanted. Further, the petitioners here seek to make appellate



districts smaller also, again lessening the number and mix of a judge's electorate.

Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "elected official" for the term "representative"; it did not do so. In a representative form of government, such as ours, it is always true that a "representative" is an "elected official"; however, the converse is *not* always true.

Representatives have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity and from many of whom they are likely, sooner or later, to receive correspondence or a telephone call or even perhaps a personal visit. Judges have but one constituency, the blindfolded lady with the scales and sword.

### F. The Fundamental Difference Between "representatives" and Members of the Judiciary is Deeply Rooted in this Country's History.

In holding that "the judiciary serves no representative function whatsoever," 914 F.2d at 625, the *LULAC* Court quoted Professor Eugene Hickok as stating that, "The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive." Hickok, "Judicial Selection: The Political Roots of Advice and Consent" in *Judicial Selection: Merit, Ideology and Politics* 5 (National Legal Center for the Public Interest 1990), *quoted at* 914 F.2d at 926.

Other scholars have also recognized this difference. Professor G. Edward White has written in *The American Judicial Tradition* that the American judicial tradition emerged with

Chief Justice John Marshall.[6] A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White summarized Chief Justice Marshall's views concerning the judiciary as follows:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence was not merely a side effect of federalism but a first principle of American civilization * * * * Against the potential chaos attendant on mass participatory democracy, republicanism erected the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

*Judicial Tradition* 18, 20.

Chief Justice Marshall's vision of the American judicial tradition was not unique. Alexander Hamilton "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the democratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some of the Founding Fathers

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[6] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.



thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has also been applicable to the state judiciary. Professor White commented that the state constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Much more recently, Chief Justice Roger Traynor of the California Supreme Court wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, quoting Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L.Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. Legislatures, on the other hand, "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' " *Judicial Tradition* 322. One Twentieth Century Justice, Felix Frankfurter, has called the judiciary

the "antidemocratic, unrepresentative" branch of government." *Judicial Tradition* 367.[7]

Various legal theorists have also stated that judges are not "representatives." Perhaps the most provocative book to appear on judicial review during the last few years is *Democracy and Distrust* by Professor John Hart Ely.[8] Professor Ely contrasts the role of the courts with the role of the representative branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. In his book, Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch (the judiciary) would review legislation to determine the motivation of the representative branch (the legislature) to make sure that the views of all groups were represented in lawmaking. He concluded by stating that "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

Professor Alexander Bickel spoke of the importance of judicial independence in *The Supreme Court and the Idea of Progress*.[9]

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[7] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in both federal and state governmental systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[8] Page references are to the 1980 Harvard University Press hardbound edition.

[9] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.



> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears – dogmatic, arbitrary, irrational, self-or group-centered, – that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought, even of those who find a result disagreeable. The judge is thus buttressed against the world, but what is perhaps more significant and certain, against himself, against his own natural tendency to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming.
>
> * * * *
>
> The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

*Supreme Court and Progress* 82, 84.

Professor Bickel contrasted the Court with the people and its representatives, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.[10]

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[10] *Supreme Court and Progress* also contains much material on reapportionment. *Supreme Court and Progress* 35, 158-59,

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## II. IF THE ONE-MAN, ONE-VOTE REQUIREMENT DOES NOT APPLY TO THE JUDICIARY, THE CONCEPT OF MINORITY VOTE DILUTION SET FORTH IN § 2(B) DOES NOT APPLY TO THE JUDICIARY.

This Court has held that the one-man, one-vote requirement does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.E.2d 679 (1973). If this requirement is inapplicable, the concept of minority vote dilution in at-large districts is similarly inapplicable to the judiciary. As the Fifth Circuit held in *LULAC*,

> Absent the one-person, one-vote rule – that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside – there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.
>
> The notion of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), White v. Regester, [412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)], and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of

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168-73. Never in that discussion is there any intimation that reapportionment requires judicial redistricting. Indeed, such a notion would run counter to his strong arguments for judicial independence.



> one-person, one-vote – the guarantee of substantial equality among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

914 F.2d at 627 (emphasis in original). The Senate Report concerning the 1982 amendment to the Voting Rights Act states "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S.Rep.No. 417, 97th Cong. 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196.

The key issue, therefore, is whether Section 2(b) of the Voting Rights Act enshrines the "one-man, one-vote" principle as the touchstone test. If it does, then it cannot be used to analyze judicial elections, because the "one-man, one-vote" test was expressly rejected as applying to the judiciary in *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *affirmed* 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973).

The express language of the plurality opinion in *Gingles*, bolstered by the language of the concurring opinions, shows that Section 2(b) is solely a "one-man, one-vote" litmus test. Justice Brennan, in speaking for the plurality, began by noting that when Section 2 of the Voting Rights Act was amended in 1982 to add Section 2(b), the Congressional revision was a response to the plurality opinion in *Mobile v. Bolden*, 478 U.S. at 35, 106 S.Ct. at 2759, 92 L.Ed.2d at 37. The plurality in *Gingles*, in interpreting what evidence it takes under Section 2(b) to prove a Section 2(a) violation, established a three-fold test:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, – in the absence of special circumstances, such as a minority candidate running unopposed * * * usually to defeat the minority's preferred candidate * * * * In establishing this last circumstance, the minority group demonstrates that the submergence in a white multi-member district impedes its ability to elect its chosen representatives.

478 U.S. at 50-51, 106 S.Ct. at 2766-67, 92 L.Ed.2d 46-47.

As Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger recognized in their concurring opinion in *Gingles*, this three-fold test equates to a requirement of proportional representation; i.e., one-man, one-vote. Justice O'Connor, speaking for these Justices, stated:

> Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.

478 U.S. at 85, 106 S.Ct. at 2784-2785, 92 L.Ed.2d at 69.

> In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2.



478 U.S. at 94, 106 S.Ct. at 2789, 92 L.Ed.2d at 74.

> The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough, proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of the single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multi-member district school, *it follows that the Court is requiring a form of proportional representation*.

478 U.S. at 97, 106 S.Ct. at 279, 92 L.Ed.2d at 76-77 (emphasis supplied).

Justice O'Connor, and the other Justices who joined in her concurring opinion, recognized that proportional representation (one-man, one-vote) is the result of the plurality's opinion. It was exactly this type of proportional representation that the plurality in *Mobile v. Bolden* had *rejected* in its analysis of both Section 2 (pre-1982 amendments) and the Fourteenth and Fifteenth Amendments:

> The theory of [Justice Marshall's] dissenting opinion – a theory much more extreme than that espoused by the District Court or the Court of Appeals – appears to be that every "political group," or at least every such group that is a minority, has a federal constitutional right to elect candidates in proportion to its numbers. * * *

> Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law.

446 U.S. at 75, 100 S.Ct. at 1504, 64 L.Ed.2d at 63-64.

The plurality in *Mobile* recognized that what is now Section 2(a) does not require a "proportionality" test. Section 2(a) was not substantially changed in the 1982 amendments. Thus, if Section 2(b) establishes a "one-man, one-vote" test, then under *Wells* it cannot be used against the judiciary.

The petitioners may take the position that there is a distinction between a "proportionality" test and a "one-man, one-vote" test. Such an argument would be unavailing, as the plurality opinion in *Mobile v. Bolden* expressly recognized.

After discussing (and rejecting) the dissent's argument concerning proportionality, the plurality in *Mobile* went further and determined that the "proportionality" argument equated to a "one-man, one-vote" test.

> The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds v. Sims, supra*, [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)] and its progeny.

446 U.S. at 77, 100 S.Ct. at 1505, 64 L.Ed.2d at 65. As *Mobile v. Bolden* recognized, the term "vote dilution" is equivalent to holding that there is a "one-man, one-vote" test. 446 U.S. at 78, 100 S.Ct. at 1505, 64 L.Ed.2d at 65-66. As the plurality in *Mobile v. Bolden* stated:

> There can be, of course, no claim that the "one-person, one-vote" principle has been violated in this case * * * it is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.



* * *

> It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of a significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

446 U.S. at 78, 100 S.Ct. 1505, 1507, 64 L.Ed.2d at 65, 66.

Because *Gingles* involves only the interpretation of Section 2(b), and because *Wells* prohibits the use of a "one-man, one-vote" test involving judicial elections, it is clear that the Section 2(b) results test cannot be used to prove a violation of Section 2(a) in judicial elections.

The concept of dilution of group voting strength [which is embodied in subsection (b) of amended Section 2] rests on two assumptions: (1) that each person's vote should have the same weight as another person's vote, and (2) that a given (protected) group should wield roughly the aggregate voting strength of its members. *See Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973). If the first assumption is not true, the second cannot be made. For *without* the assumption of substantial equality among voting shares made possible by the one-man, one-vote principle, no aggregate measure of minority voting strength – and therefore no measure of dilution of that strength – is conceivable. Because the one-man, one-vote rule does *not* apply to the judiciary, the conceptually dependent notion of minority group vote dilution, embodied in subsection (b), has no field of operation in judicial elections.

This argument has nothing to do with statutory interpretation, does not depend on a particular construction of the word "representative" as used in subsection (b), and

is not based on whether Congress intended that amended Section 2 have some field of operation with respect to judicial elections. It is, instead, based on an explanation of why, regardless of what breadth Congress intended for amended Section 2, minority group vote dilution – as that concept has developed in the voting rights jurisprudence – simply cannot exist unless the one-man, one-vote rule applies.

*Thornburg v. Gingles*, the Court's definitive exegesis of Section 2 vote dilution, sharpens this point. In her concurring opinion, Justice O'Connor, joined by Powell, Rehnquist, and Chief Justice Burger, notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Gingles*, 478 U.S. at 88, 106 S.Ct. 2786, 92 L.Ed.2d at 71. There is no doubt that the yardstick adopted by the *Gingles* Court – a calculation of the minority's potential voting strength in a single-member district system – rests on the assumption that the one-man, one-vote rule applies and that each district has roughly the same population. *See* 478 U.S. at 50-51 n. 17, 89-90, 106 S.Ct. 2766-67 n. 17, 2787, 92 L.Ed.2d at 46-47 n.17, 72. Otherwise, to paraphrase Justice Harlan, the Court would be unable even to measure what it purports to equalize. *Whitcomb v. Chavis*, 403 U.S. at 169, 91 S.Ct. 1883, 29 L.Ed.2d at 391 (Harlan J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one-man, one-vote rule, *Gingles'* first prong is meaningless in the judicial



context. It is always possible to construct a geographically compact black voting majority district by continuing to reduce the total population in that district down to, if necessary, a minimum of one. There ARE no "judicially discernable and manageable standards" by which a court could find that a given judicial election system does *not* dilute minority voting strength if the population size of the hypothetical single-member subdistrict can be contracted or expanded at will. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663, 686 (1962). As one lower court has held, "An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

## CONCLUSION

This Court has always recognized the importance of an independent judiciary, holding in *Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970): "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." 398 U.S. at 84, 90 S.Ct. 1648, 26 L.Ed.2d at 108. In a dissent in the same case, Justice Douglas stated, "An independent judiciary is one of this Nation's outstanding characteristics." 398 U.S. at 136, 90 S.Ct. 1648, 26 L.Ed.2d at 137 (Douglas, J., dissenting).

A quarter of a century ago this Court declared, "Legislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506, 527 (1964). Unlike legislators, judges are not "instruments of government elected directly by and directly representative of the people." 377 U.S. at 562, 84 S.Ct. 1362, 12

L.Ed.2d at 527. Making judges representatives would do violence to (and perhaps destroy) the American concept of an independent judiciary.

For the reasons set forth herein, this Court should deny the Petition for Certiorari.

All of the above and foregoing is thus respectfully submitted.

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